There is error, judgment reversed and judgment that plaintiff recover one undivided moiety of the lands mentioned in the pleadings, and that partition be made between the plaintiff Martha and the defendant Mary.

To this end, it is referred to the clerk to inquire whether a sale will be necessary for the purpose of partition; and an account will be taken of the rents and profits; the plaintiff will have judgment for costs.

Burton v. *Burton*, 26 Howard's Practice Rep. 474; *Ludlam* v. *Ludlam*, 31 Barb. 487, cited on the argument, received due consideration by the court.

Since the foregoing case was decided the Supreme Court of the United States, in *Kelly* v. *Owen*, have construed the same Act of Congress. We have not seen the full opinion (which will be published in 7 Wallace); but, judging from the syllabus, furnished us by the Reporter (ante, p. 444), the court seems to take the same view of the act as the court in the foregoing case.

J. T. M.

Supreme Court of Alabama.

J. DUBOSE BIBB *v.* EVELYN POPE.

The husband and wife cannot enter into a mortgage of her statutory separate estate for the purpose of subjecting it to sale for the payment of the husband's debts; and if they do, a court of chancery will not permit the mortgage to be enforced by sale of the wife's separate estate, if she objects to it.

THE opinion of the court was delivered by

PETERS, J.—On the 5th of April 1866, Augustus Pope, the husband of Mrs. Evelyn Pope, appellee, borrowed of J. Dubose Bibb, appellant, the sum of $10,000, for which he gave his bill of exchange for $12,400, payable eight months after date, to order of said Bibb. On the same day said Augustus Pope executed and delivered to said Bibb a certain conveyance in writing, in the form of a mortgage, whereby he conveyed to Bibb certain lands therein named, which belonged to himself, and a lot numbered 57 in the city of Montgomery in this state, which was the separate property of his wife, said Evelyn Pope. This mortgage contained a power to sell the land contained therein, in the event that Pope failed to pay said bill of exchange at its maturity. Mrs. Pope united with her husband in this mortgage, and the same is attested by two

witnesses. At the maturity of the bill of exchange Pope failed to pay it, and Bibb then proceeded to advertise a sale of the mortgaged property, for the purpose of selling the same for payment of his debt against said Augustus Pope; and included in said advertisement the lot belonging to Mrs. Pope, as her separate estate. Thereupon Mrs. Pope by her next friend filed her bill in the Chancery Court of Montgomery county aforesaid against said Bibb, and said Augustus Pope her husband, for the purpose of enjoining and preventing said proposed sale of her said lot No. 57. An injunction was granted her, and upon the final hearing it was made perpetual. The bill was filed on the 23d day of January 1867. It appears from the bill and proofs, that B. N. Wilkerson and his wife Elizabeth gave the lot in controversy to Mrs. Pope by deed, on the 10th day of August 1860, to have and to hold the same to her, "her heirs and assigns, to her use and behoof for ever." Upon the hearing, the Chancellor sustained the bill and perpetually enjoined Bibb from selling said lot No. 57 as the separate estate of Mrs. Pope, under said mortgage, and taxed Bibb with the costs. From this decree Bibb appeals to this court.

The only question discussed at the bar was, whether Mrs. Pope was bound by said mortgage, and whether her statutory separate estate was liable to be sold under it, to pay her husband's debt due by said bill of exchange to said Bibb. This question has not heretofore been settled by any decision of this court. In discussing it, the court cannot close its eyes to the fact that the wife is under the *power* of the husband, and often acts, when he chooses to invoke her aid, under an influence but little less potent than actual duress, nor can it ignore the further fact that the law, under the common-law system, has treated the wife in some respects as the servant of the husband, subject to his control, even to chastisement by stripes "in case of any gross misbehavior:" 1 Bl. Com. 444, 445; 2 Kent Com. 181. She has been placed very much upon the footing of a child during its minority. She has had no voice in any one of the great departments of the government; no voice at the ballot-box; no voice on the jury. She rarely deals with the husband, nor, where he is interested, upon equal terms with him. These circumstances have rendered her, of late years, the peculiar object of legislative solicitude and protection. The law-making wisdom of the state has seen and felt

her need of greater protection than the common law afforded, and has devised, under various titles, "laws for the protection of the rights of married women." Thus far such laws have recommended themselves so strongly to public favor, that, to secure them from repeal and fluctuation, they have been in many instances incorporated into the fundamental law of the state. And we think it safe to say that the declared and manifest purpose of such enactments furnishes a just rule for their interpretation. They were made to avoid the known insecurity to which the estates of married women are exposed, from the improvidence or maladministration of the husband, who necessarily exercises so large a control over the wife, and through her over her estate.

The Code of 1853, which is copied into the Revised Code of this state, and which latter code, with certain modifications, is now the law that must govern the judgments of this tribunal, declares that "all the property of the wife, held by her previous to the marriage, or which she may become entitled to after the marriage *in any manner*, is the separate estate of the wife, *and is not subject to the payment of the debts of the husband.*" And another section of the same law vests in the husband, as the trustee of the wife, her separate estate; and gives him the control and disposition of the "*rents, income, and profits thereof*, but such rents, income, and property *are not subject* to the *payment of the debts of the husband:*" Rev. Code, §§ 2371, 2372; *Patterson* v. *Flanagan*, 37 Ala. 513.

The bill in this case is filed by the wife, Mrs. Pope, to prevent the sale of her separate estate for the payment of the debt of her husband, Augustus Pope—a thing which the statute declares shall not be done. If, then, this sale is permitted, the whole purpose of the law, so far as it protects the wife's separate estate, will be defeated, for when the principle is once admitted that this may be done, methods and ways will soon be discovered to carry it into unlimited effect. This cannot be allowed. It would be a violation of law by indirection; and what it is illegal to do directly, is also illegal if done indirectly. For it is the *thing* that is forbidden, and not the *manner* of doing it. In whatever form, then, whether of law or in equity, this is attempted, the power to do it is denied by the express words of the statute, by the whol scope of its intent, and by the character of the evil sought to be remedied.

It was very earnestly contended at the bar, by the learned counsel for the appellant, that the wife had the power to sell, and therefore she had the power to mortgage her estate for the payment of the husband's debts: because the power to sell was the greater power; and as the greater always contained the less, the right to mortgage, because it was a *form* of sale, followed the power to sell as necessary consequence: *Omne major continet in se minus*: Broom's Max. 129; 2 Kent 553, 554; Hamilton's Log. 208. This is an admitted rule of logic and also of law, but it is not strictly applicable in this case. The distinction is lost sight of that the wife can neither sell nor mortgage her separate estate under the statute, for the payment of the husband's debts. This would defeat the purpose and words of the act of itself. It would tear away from the wife its whole protective force, whenever the husband chose to avail himself of her means. She is much under the influence of the affections, and shrewd and unscrupulous men know how to take advantage of this weakness, often to her beggary and ruin, and it is this that the law interposes to prevent. In *Warfield* v. *Ravesies and Wife*, this court have said that "property held by the wife, either under the Act of 1850 or under the Code, cannot be said to be the separate estate of the wife *in its broadest sense*:" 38 Ala. 523. Yet it is in this sense that the appellant presses his rights on the court. The sale that the wife and her husband are permitted to make without the aid of a court of chancery is only such a sale as is mentioned in the act. That is, a sale for the purpose of reinvesting the proceeds in other property, which is also the separate estate of the wife, or for the support of the family. A mortgage within these limits would be almost a futile act; and such is not the mortgage here insisted on: Rev. Code, §§ 2373, 2374, 2376; *Alexander* v. *Saulsbury*, 37 Ala. 375; *Warfield* v. *Ravesies and Wife*, 38 Id. 518.

It is further urged against the validity of this mortgage that it is a fraud upon Mrs. Pope, and void for that reason. Her husband is her trustee; the mortgage could not have been accomplished without his concurrence; that its execution prejudiced the trust estate for the benefit of the trustee and not for her benefit; and that if it is enforced, it will utterly ruin the trust estate solely for the trustee's individual profit. Bibb knew this, or was bound to know it, and cannot be excused if he did not. And to permit him to take advantage of it would be to aid him and the trustee

to profit by their own injurious acts: Broom's Max. 215, 216 And although the transaction might not be strictly and technically a fraud, it has the same effect. And upon the same principle that the greater contains the less, it may be said with equal truth that, things equal to the same thing are equal to each other. So that whatever has the effect of a fraud in the management of a trust must be treated as a fraud: Rev. Code, § 2372; *Johnson* v. *Thweatt*, 18 Ala. 741; *Boney* v. *Hollingsworth*, 23 Id. 690; *Trippe* v. *Trippe*, 29 Id. 637; *Charles* v. *Du Bose*, Id. 367; 1 Story's Eq., § 322; 1 Id. 323.

Decree affirmed.

Supreme Court of Michigan.

JAMES FOSTER *v.* THE PEOPLE.

An accomplice who has given testimony criminating himself as well as his co-defendant, on whose trial he testifies, cannot refuse to answer fully on cross-examination concerning the entire transaction of which he has undertaken to give an account, and in which he had shown himself guilty.

Evidence that a person charged with larceny had previously attempted to purchase a chattel similar to that stolen, has no tendency to disprove theft, and is not admissible for that purpose.

THE opinion of the court was delivered by

CAMPBELL, J.—The respondent was informed against jointly with one William McCoy, in the Circuit Court for the county of Macomb, for the larceny of a horse and some other articles. Foster was tried separately, and the other defendant, McCoy, was used by the People as a witness against him.

McCoy proved facts tending to show the guilt of Foster, and showing also his own guilt in receiving the horse in Detroit and taking him to Toledo, where the witness was arrested with the stolen property. Upon cross-examination he admitted that he had made an affidavit for continuance, in which he swore that, as he had been advised by counsel, and believed, he had a good defence upon the merits. Counsel for Foster then asked what that defence was. The counsel for the People objected to the question, on the ground that a person accused of crime could not, while a trial was pending, be compelled to disclose his defence. The court overruled this objection, and then the witness declined